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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/915,469	05/21/2001	Matthias Kleespies	KLEESPIES (PCT) (CIP)	6681

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EXAMINER
WARE, DEBORAH K

ART UNIT	PAPER NUMBER
1651	6

DATE MAILED: 03/27/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.	Applicant(s)
09/915,469	Kleepsies
Examiner	**Art Unit**
Ware	1651

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136 (a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1) ☒ Responsive to communication(s) filed on *Jan 6, 2002*

2a) ☐ This action is **FINAL.** 2b) ☒ This action is non-final.

3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

Disposition of Claims

4) ☒ Claim(s) *1-6* is/are pending in the applica

4a) Of the above, claim(s) _____ is/are withdrawn from considera

5) ☐ Claim(s) _____ is/are allowed.

6) ☒ Claim(s) *1-6* is/are rejected.

7) ☐ Claim(s) _____ is/are objected to.

8) ☐ Claims _____ are subject to restriction and/or election requirem

Application Papers

9) ☐ The specification is objected to by the Examiner.

10) ☐ The drawing(s) filed on _____ is/are objected to by the Examiner.

11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved.

12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. § 119

13) ☒ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d).

a) ☐ All b) ☐ Some* c) ☐ None of:

1. ☐ Certified copies of the priority documents have been received.
2. ☒ Certified copies of the priority documents have been received in Application No. *09/254,827*.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

*See the attached detailed Office action for a list of the certified copies not received.

14) ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).

Attachment(s)

15) ☒ Notice of References Cited (PTO-892)

16) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)

17) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s). _____

18) ☐ Interview Summary (PTO-413) Paper No(s). _____

19) ☐ Notice of Informal Patent Application (PTO-152)

20) ☐ Other:

Claims 1-6 are presented for examination on the merits.

The Application is a continuation-in-part of application serial no. 09/254,827, filed March 12, 1999, of which is now abandoned. It is noted that Applicants have provided cross reference to related applications, however, the status of the parent case has not been indicated. Thus, Applicant is requested to update the status of the parent at line 1, page 1, of the specification wherein after "09/254,827, filed on March 12, 1999" insert --, now abandoned, --.

1. Acknowledgment is made of applicant's claim for foreign priority under 35 U.S.C. 119(a)-(d). The certified copy has been filed in parent Application No. 09/254,827, filed on March 12, 1999. Furthermore, the correction request for filing receipt filed February 20, 2002 has been received and Applicant is directed to the end of this Office Action for information regarding this paper. Also the copy of the petition under rule 136(a) and rule 17 (a) (3) filed in the parent has been placed in the instant filed. The initialed and corrected declaration is also acknowledged.

2. The following is a quotation of the first paragraph of 35 U.S.C. 112:

> The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

3. Claims 1-6 are rejected under 35 U.S.C. 112, first paragraph, as containing subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention.

The claims are not enabled for forming solid bodies made of water insoluble dextrans for simplifying removal of the solid bodies from the mixture.

4. The following is a quotation of the second paragraph of 35 U.S.C. 112:

> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

5. Claims 1-6 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claims 1-6 are rendered vague and indefinite for the recitation of "made of water insoluble dextrans for simplifying removal of the solid bodies from the mixture" wherein it is unclear whether this is a process step for recovering the solid bodies or what? Further, there is not clear support for "water insoluble dextrans" in the instantly filed specification. Also it is uncertain what the term "simplifying removal" is to mean in the claims, especially since there is no removal step required because there is no positive recitation of such step in the method. The claims fail to recite clear and distinct process steps for carrying out the claimed method at least with respect to the language rejected above. It is uncertain that a recovery step is intended. Further, there is no clear support in the specification for this step or at least the examiner could not find this step in the specification. Further, claim 3 recites inconsistent terminology with respect to the drying step and it is suggested to use consistent terms in the claims. Thus, like in claim 5 claim 3 should recite --said drying step--.

6. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

7. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless --
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

8. Claims 1-6 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Tokumaru et al., cited on the previously submitted PTO-1449, of record in the parent case and now of record in the instantly filed case.

Claims are drawn to a culture wherein nutrients are added thereto via a process comprising a drying step.

Tokumaru et al. teach the same culture and process of making including drying thereof. Note the abstract and kefir grains are treated with water to provide for a kefir starter culture to produce solid bodies (i.e. granules), note columns 5-6, all lines and Table 6, wherein water is contained by the kefir cultures. Hence, a water kefir culture is used to manufacture solid bodies (i.e. powdered particles, granules, tablets, etc.). Note also column 8, all lines.

The claims are identical to the disclosure of Tokumaru et al. and are therefore, considered to be anticipated by the reference. The result of obtaining or simplifying removal of the solid bodies from the mixture is an inherent result of drying said mixture of Tokumaru. Further, petri culture dishes for fermentation before drying read on molds and the powdered particles indicate confectionary sugars (i.e. waste or baking agents). The insoluble dextran is a product of lactic acid bacteria and thus, is an inherent result of fermentation lactobacilli containing culture (Kefir). Furthermore, chemical modification may take place during fermenting of which is intrinsic to chemical modification of the mixture.

However, in the alternative that there are specific steps such as perhaps chemically modifying the mixture, addition of waste, pouring into molds, freeze drying, adding a propellant (i.e. baking agent), for which provide a difference significant enough to remove the reference as a 102, then it is the examiner's position that the differences provided by these additional steps are so slight as to render the process alternatively obvious over Tokumaru since fermentation which takes place upon adding nutrients to water kefir would have been expected to provide the chemical modification step as well as petri dishes would have been expected to serve as a mold for the mixture before drying. Also to use waste and add baking agents to a fermentation process are well known ingredients in the art, as is the technique of freeze drying. The claims would have been alternatively obvious over the cited art instead, thereof.

9. Claims 1-6 are rejected under 35 U.S.C. 103(a) as being unpatentable over Tokumaru et al., cited above, in view of **newly cited** Schwartz et al. (A).

10. Claims and Tokumaru et al. are discussed above.

11. Schwartz et al. (Schwartz) teaches that lactic acid bacteria cultures produce insoluble dextrans, see column 1, lines 65-68.

The claims differ in that Tokumaru et al. is silent with respect to insoluble dextran being present.

It would have been obvious to one of ordinary skill in the art at the time of Applicant's invention to combine the teachings of Tokumaru et al. and Schwartz in order to obtain solid bodies made of water insoluble dextrans. Clearly Tokumaru teach the solid bodies and most likely the insoluble dextrans are an inherent result of the fermentation which takes place with the Kefir cultures being added to water. However, Schwartz clearly teaches that insoluble dextran is produced via lactic acid bacteria culture. Therefore, the combination of references clearly makes obvious the claimed process. One of skill would have at least expected the Kefir cultures to produce insoluble dextrans and thus, the solid bodies made of water insoluble dextrans produced by adding nutrients to Kefir cultures is clearly an expected successful result of the fermentation process. One of skill would have been motivated to utilize Kefir cultures for such purposes. Also solid bodies produced by the claimed process are conventional and also known as Japanese Sea Crystals as admitted by Applicant's own disclosure. Therefore, the claims are prima facie obvious in the absence of persuasive evidence to the contrary. There is no step which is performed by the claimed process which is not known as indicated by the cited prior art nor

which would have provided an unexpected successful result over what has already been disclosed in the prior art.

The paper filed on February 20, 2002, (certificate of mailing dated January 30, 2002) has not been made part of the permanent records of the United States Patent and Trademark Office (Office) for this application (37 CAR 1.52(a)) because of damage from the United States Postal Service irradiation process. The above-identified papers, however, were not so damaged as to preclude the USPTO from making a legible copy of such papers. Therefore, the Office has made a copy of these papers, substituted them for the originals in the file, and stamped that copy:

COPY OF PAPERS

ORIGINALLY FILED

If applicant wants to review the accuracy of the Office's copy of such papers, applicant may either inspect the application (37 CAR 1.14(d)) or may request a copy of the Office's records of such papers (*i.e.*, a copy of the copy made by the Office) from the Office of Public Records for the fee specified in 37 CAR 1.19(b)(4). Please do **not** call the Technology Center's Customer Service Center to inquiry about the completeness or accuracy of Office's copy of the

above-identified papers, as the Technology Center's Customer Service Center will **not** be able to provide this service.

If applicant does not consider the Office's copy of such papers to be accurate, applicant must provide a copy of the above-identified papers (except for any U.S. or foreign patent documents submitted with the above-identified papers) with a statement that such copy is a complete and accurate copy of the originally submitted documents. If applicant provides such a copy of the above-identified papers and statement within **THREE MONTHS** of the mail date of this Office action, the Office will add the original mailroom date and use the copy provided by applicant as the permanent Office record of the above-identified papers in place of the copy made by the Office. Otherwise, the Office's copy will be used as the permanent Office record of the above-identified papers (*i.e.*, the Office will use the copy of the above-identified papers made by the Office for examination and all other purposes). This three-month period is not extendable.

All claims fail to be patentably distinguishable over the state of the art discussed above and cited on the enclosed PTO-892 and/or PTO-1449. Therefore, the claims are properly rejected.

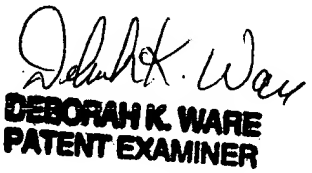
The remaining references listed on the enclosed PTO-892 and/or PTO-1449 are cited to further show the state of the art.

No claims are allowed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Deborah K. Ware whose telephone number is (703) 308-4245. The examiner can normally be reached on Mondays to Fridays from 9:30AM to 6:00PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mike Wityshyn, can be reached on (703) 308-4743. The fax phone number for the organization where this application or proceeding is assigned is (703) 305-3592.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0196.



Deborah K. Ware

Art Unit 1651

March 23, 2002